1992

Foster Leonard v. State of Utah : Petition for Writ of Certiorari

Utah Supreme Court

R. Paul Van Dam; attorney general; Marian Decker; assistant attorney general; attorneys for respondent.
Jose Trujillo; attorney for petitioner.

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

FOSTER LEONARD,	:	
	:	Supreme Court
Petitioner,	:	Case No. 920140
	:	
v.	:	Court of Appeals
	:	Case No. 900560-CA
STATE OF UTAH,	:	
	:	Priority No. 13
Respondent.	:	

PETITION FOR WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts erred in characterizing as a mere "level-two stop" an initial police-citizen encounter in which the defendant's car was pulled over by three patrol cars carrying four police officers, at least three of whom got out of the cars and converged upon the defendant and his woman passenger; where it was "very possible" that the officers had their guns drawn, even though there was no evidence that the defendant or his passenger--who were then suspected of traffic violations and a possible purchase of drug equipment or precursor chemicals--were armed or dangerous, and the defendant voluntarily exited the car and walked towards the officers in a cooperative, non-violent manner; where the stop was made on a well-traveled freeway during daylight hours; where the defendant was forced to kneel by the side of the freeway with his hands in front of him; where the defendant's passenger was placed in one of the patrol cars for questioning; and where the defendant and his passenger were advised of their Miranda rights before being questioned.

2. Whether the State met its burden of showing that the initial stop of the defendant was sufficiently justified and limited to satisfy the conditions of a "level-two stop."

3. Whether the defendant's rights under the fourth amendment to the United States Constitution and Article I, Section 14, of the Constitution of the State of Utah were violated because probable cause was lacking for a de facto arrest.

OPINION AND ORDER OF THE COURT OF APPEALS

The Court of Appeals' opinion and order denying rehearing are found in Appendix 1 to this petition.

JURISDICTION OF THE UTAH SUPREME COURT

On December 5, 1991, the Court of Appeals filed its opinion affirming the defendant's conviction. See, State v. Leonard, 175 Utah Adv. Rep. 49 (Utah App. 1991). Counsel for the State nevertheless filed a Petition for Rehearing on December 18, 1991. The Court of Appeals denied the State's Petition on January 9, 1992.

Mr. Leonard retained new counsel and filed a timely motion for an extension of time until March 11, 1992, in which to file a Petition for Writ of Certiorari. The motion for an extension was granted by order dated February 11, 1992. Thus, this petition is timely under Utah Rules of Appellate Procedure 48(a) & (e).

The Utah Supreme Court has jurisdiction over this petition pursuant to Utah Code Ann. §§ 78-2-2(3)(a) & (5) (Supp. 1990).

CONTROLLING STATUTORY AND CONSTITUTIONAL PROVISIONS

The full text of the following provisions is contained in Appendix 3 to this petition:

United States Constitution, Amendment IV

Constitution of Utah, Art. I, § 14

Utah Code Ann. § 77-7-2 (1990)

Utah Code Ann. § 77-7-15 (1990)

STATEMENT OF THE CASE

A. Proceedings below

Mr. Leonard was arraigned on drug-related charges in the Fourth Judicial District Court of Utah County. He filed a motion to suppress evidence obtained from searches of his residence and the car he was driving. Judge George E. Balliff conducted a hearing on the motion on August 29, 1989, and denied the motion in a Ruling dated October 19, 1989. (See, Appendix 2.)

Mr. Leonard then entered a conditional plea of guilty to a charge of possessing equipment with intent to manufacture a controlled substance, in violation of Utah Code Ann. § 58-37c-8 (1990) and a charge of conspiracy to manufacture a controlled substance, in violation of Utah Code Ann. § 76-4-201 (1990). (R. 44, 51, 65, 108-121, 151-158.) A final judgment of conviction was entered, and he was sentenced to not more than five years in prison and a $1,000 fine on each count, the sentences to run concurrently. (R. 187.)

On appeal to the Utah Court of Appeals, Mr. Leonard contended that the trial court erred in denying his motion to suppress. He argued that: (1) his arrest was not based upon probable cause; (2) the search of the vehicle he was driving was not based on probable

cause; and (3) the search of his residence was tainted by the illegality of the arrest. See, State v. Leonard, Appendix 1 at 3.

The first argument was directed not so much at the legality of the officers' conduct when they later placed the defendant formally under arrest, but at the legality of the initial stop or seizure. On this issue, the appellate judges were in sharp disagreement. Judge Norman H. Jackson concluded "that there was an articulable suspicion which justified the stop of defendant's vehicle, and that therefore the level two seizure of defendant was reasonable." Id. at 6.

Judge Gregory K. Orme agreed that the officers had the requisite articulable suspicion to warrant a level-two stop. However, "[g]iven the intrusive tactics employed by the investigating officers," he believed the initial seizure was a "de facto arrest requiring probable cause." Id. at 16 (J. Orme, dissenting).

Judge Leonard H. Russon believed "probable cause to arrest Leonard existed at the time at which the officers stopped Leonard's vehicle." Id. at 15-16 (J. Russon, concurring). But as Judge Orme emphasized, the State itself did not "contend that there was probable cause to arrest defendant or subject him to anything more intrusive than a level-two Terry stop at the time the police officers effected the stop and asked their initial questions." Id. at 16 (J. Orme, dissenting).

B. Facts

The trial court's Ruling contains the following findings of fact pertinent to the initial stop:

> (1) From approximately May 1, 1989, law enforcement agencies had been conducting surveillance at Intertech Chemical in Orem, Utah. The surveillance has resulted in a number of arrests and convictions.
>
> (2) On July 20, 1989, Detective Terry Fox was conducting surveillance at Intertech. He noticed defendant Leonard in the parking lot wearing casual clothes and using what appeared to be a personal vehicle rather than a company vehicle.
>
> (3) Leonard behaved in a nervous manner. He purchased what looked to the detective to be glassware and chemicals and appeared to pay in cash. Defendants loaded the glassware and chemicals in to the vehicle and left the parking lot.
>
> (4) Detective Fox decided to follow the vehicle in order to identify its owner. As Fox attempted to follow the vehicle, another car swerved in front of Fox in an apparent attempt to disrupt his progress. It appeared to Fox that the defendants' vehicle was trying to evade pursuit. Fox noted reckless behavior on the part of the defendants as they turned to get on the freeway that nearly caused an accident. On the freeway, the defendants' accelerated to over 70 miles per hour in a 55 miles per hour zone.
>
> (5) Detective Fox called for back up after a check through dispatch found no owner registered for either the plates of the defendants' vehicle nor for the vehicle that swerved in front of him. The vehicle was stopped without incident after the backup arrived. . . .
>
> (6) The Court finds that the stop made by the officers was appropriate and legal. Detective Fox had reasonable suspicion based on the circumstances taken as a whole. The defendants did not appear to be ordinary businessmen; they appeared to be nervous; they drove erratically; they used what appeared to be a personal vehicle; another car

> seemed to be acting in concert with defendants in an attempt to block the detective's pursuit; dispatch could not identify [the] owner of the vehicle from the license plate number; the defendants were traveling more than 15 miles per hour in excess of the speed limit; the list of items purchased given to the officers while in pursuit were indicative of illegal activity. All of these factors taken together could easily create a reasonable and articul[able] suspicion necessary to make an investigatory stop. . . . .
>
> (7) Even before the officers began investigatory questioning which does not require it, defendants were given Miranda warnings.

(Ruling at 1-4, Appendix 2.)

On appeal to the Utah Court of Appeals, Mr. Leonard did not dispute the underlying facts so much as the subjective interpretations placed on those facts and the trial court's ultimate findings that the officers had the requisite justification for their conduct.

The Court of Appeals' Opinion summarizes the pertinent facts in a section called "Background." Of these facts, as the Opinion correctly notes, "only facts known to the officers at the time they stopped defendant's vehicle are relevant" to the validity of the initial stop (Opinion at 6, n.3; emphasis in original). See, State v. Mendoza, 748 P.2d 181, 183 (Utah 1987); State v. Baird, 763 P.2d 1214, 1217 (Utah App. 1988).

The following facts are also relevant and appear in the record:

1. What the officers knew

Mr. Leonard's conduct at Intertech was observed by Officer Fox, who testified as follows:

> [The defendant and Ms. Garza] entered the business. They were driving a silver and blue Ford Bronco. When they entered the business, I noticed that they weren't dressed as typical businessmen, meaning Levis and Polo shirt. When they walked in the business I saw the male defendant here, Mr. Leonard, walk to the doorway, stand there in the doorway smoking a cigarette, keep pacing around, looking around as if scanning the parking lot area . . .
>
> As he scanned around, he finished his cigarette.
>
> I saw a female employee inside the business . . . set out cartons or containers. These cartons or containers had pictures on them in blue and black consistent with glassware boxes. They had pictures of flasks on them. I saw her set out gallon containers, some type of chemical. I couldn't tell what it was at that time.
>
> And then I saw Mr. Leonard continue to come to the doorway, look around. . . .
>
> Mr. Leonard continued to do what appeared to be surveillance. He lifted up his front shirt and appeared to be doing something down the front of his pants here, and then looked like to me he took a wallet from his pants . . .
>
> As he looked around, pretty soon these chemicals were loaded by the front doorway by the employees of Intertech. Mr. Leonard came out and got into this Bronco and drove it over by the front door. And he and Miss Garza loaded these chemicals into the back of the Bronco . . .
>
> They both got into the Bronco and proceeded to leave the business.

(T. 10-13.)

Officer Fox thought the suspicious thing about Mr. Leonard and

Ms. Garza's conduct was "[j]ust the items being taken out." (T. 30.) It was Mr. Leonard's appearance at a store that was under surveillance--not looking like a "legitimate businessman"-- that aroused the officer's suspicion. He thought a "legitimate businessman" would instead "show up with something identifying his company, would look presentable, wouldn't scan the parking lot, reach down the front of his pants, wouldn't appear to be so nervous. Those type of things." (T. 28-29.)

Officer Fox followed the Bronco for some time in his unmarked police car, all the way from Orem to approximately SR 92, north of Lehi. (T. 18, 37 & 52.) During this time, he observed several moving violations by Mr. Leonard: a failure to yield the right of way when turning left, two lane changes without signaling, and traveling about 70 miles per hour in a 55 mile zone. (T. 14, 16 & 18.) Officer Fox thought these violations "bordered on reckless driving." (T. 35.)

When Officer Fox ran a registration check on the Bronco, dispatch reported that the plates on the vehicle were not on file. (T. 15.) (It was later found, as Mr. Leonard told the officers at the time of the initial stop, that the Bronco was registered to his passenger, Ms. Garza. T. 43 & 67.)

"[M]aybe 20 seconds prior to the stop," Officer Caldwell called Intertech to inquire what items had just been sold. (T. 33-34 & 43). The officers determined that "[n]othing that they

purchased was illegal or regulated"--"[i]t was a legal purchase." (T. 34-35).

2. What the officers did

We now turn to the facts showing the intrusiveness of the encounter. As Judge Orme notes, "[l]ittle attention seems to have been given at the evidentiary hearing to what the police did in effecting the stop as opposed to what they knew in deciding to effect the stop." (Dissenting opinion, n.5.) However, the transcript of the hearing shows the following facts about the officers' conduct:

Officer Fox called for back-up because "the past people we have dealt with have been felons, had extensive criminal histories --some of them for homicide--have been escapees from prison and were armed in these type of stops, I was concerned for my safety." (T. 17.) "The flags coming out the side windows[1] was very unique, strange to me, and it kind of frightened me. So I continued to call for backup and assistance." Id.

Two additional vehicles responded to the call. The vehicle that first approached the Bronco to make the stop carried two officers, Blackhurst and Caldwell. In the second vehicle was Officer Greening. Officer Fox followed in a third vehicle. (T.

[1] Apparently the "flags" were tied to the Bronco's seat belts and went up when the seat belts were fastened. (See, T. 37.)

18.) Thus, a total of four officers from three police cars effected the stop. (T. 33-34 & 38.)

When the cars stopped, Officer Fox stepped out and joined Officers Caldwell and Blackhurst by the first car. (T. 19.) Officer Greening also exited his patrol vehicle and "maintained a secure position" there. (T. 52.) In the meantime, Mr. Leonard got out of the Bronco and started walking back towards them. Id. He identified himself and answered the officers' questions about the registration.[2] (T. 67.)

Officer Fox ordered Mr. Leonard to kneel down "so I could watch his hands and he wouldn't flee from me." (T. 19.) Then the officer ordered Ms. Garza to get out of the vehicle and to come back and kneel down as well. Id. They were kneeling in the emergency lane, on the north side of Lehi on I-15 northbound. (T. 18-19.)

Officer Fox did not have his gun drawn but thought it was "very possible" that other officers did have their guns drawn. (T. 39.) Officer Caldwell didn't have a gun but "hoped" that another of the officers pulled a gun when they got out of the car. (T. 90.)

Officer Caldwell took over. He ordered Mr. Leonard to the side of the road and advised him of his Miranda rights, then

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[2] At this point in time, the officers did not know whether the information Mr. Leonard gave them was true or false.

started asking what they were doing. (T. 19.)

After interviewing Mr. Leonard and Ms. Garza for approximately 15 minutes, the officers made a formal arrest and took them to the American Fork Police Department. (T. 20.)

REASONS WHY THE QUESTIONS PRESENTED JUSTIFY ISSUANCE OF THE WRIT

Question 1: Was this a "level-two stop" or a de facto arrest?

The fourth amendment to the United States Constitution[3] requires that the "seizure" of a person be supported by "probable cause." A limited exception to this requirement was first recognized in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Since the brief stop in Terry was less intrusive than an arrest, the United States Supreme Court held that probable cause was not necessary. However, the Court said the police officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. at 21, 88 S.Ct. at 1880.[4]

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[3] The fourth amendment is applicable to the states through the fourteenth amendment. Mapp v. Ohio, 376 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Article I, Section 14, of the Constitution of the State of Utah, is similar in language to the fourth amendment. (See Appendix 3.)

[4] Utah has codified the reasonable suspicion standard. Utah Code Ann. § 77-7-15 (1990). (See Appendix 3.)

This Court has explained that there are three levels of police-citizen encounters, each of which requires a different degree of justification to be constitutional:

> (1) an officer may approach a citizen at anytime and pose questions so long as the citizen is not detained against his will;
>
> (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop";
>
> (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987), quoting United States v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984). "Any time a police officer stops an automobile the stop necessarily involves detention and therefore is [at least] a level two encounter . . ." State v. Baird, 763 P.2d 1214, 1216 (Utah App. 1988).

The stop in this case was even more intrusive. A level-two or Terry stop "involves no more than a brief stop, interrogation, and, under the proper circumstances, a brief check for weapons." United States v. Robertson, 833 F.2d 777, 780 (9th Cir. 1987). Anything beyond such a brief and narrowly-defined intrusion constitutes a de facto arrest, and probable cause is required. See id.; Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 2254 (1979).

As this Court held in State v. Johnson, 805 P.2d 761, 763 (Utah 1991), the "length and scope of the detention must be

'strictly tied to and justified by the circumstances which rendered its initiation permissible.'" For a stop to be "constitutionally permissible upon less than probable cause, it must be appropriately limited as to length and the investigative techniques employed." 3 W. LaFave, Search and Seizure, § 9.2(f) (2d Ed. 1987 & Supp. 1992) (emphasis added).

In Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319) (1983), the purported Terry stop of a suspect at an airport lasted only 15 minutes, but the four-Justice plurality found it to be insufficiently limited--an illegal arrest. "[A] Terry stop can become an arrest (& consequently an illegal one if probable cause is not then present) if it now appears that the police could have utilized some other means of investigation which it is believed would have been less intrusive." LaFave, supra, § 9.2(f).

If the show of force and detention used in the context of a purported Terry stop are "indistinguishable from police conduct in an arrest," the seizure is invalid. United States v. Delgadillo-Velasquez, 856 F.2d 1292, 1295 (9th Cir. 1988) (Terry stop of suspected drug dealers was invalid where police approached with guns drawn, ordered the suspects to lie down in the street, and handcuffed them). Thus, police may not, as a matter of routine, utilize methods in the course of a valid Terry stop which might commonly be employed incident to arrest. LaFave, supra, § 9.2(d) at 366.

The methods used by the officers in this case are commonly employed in an arrest: ordering a suspect to kneel, confining a suspect in the patrol car for interrogation, and informing the suspect of Miranda rights.

There was also an unusual showing of force and authority. Three officers and four patrol cars effected the arrest of Mr. Leonard and his sole passenger, a young woman. It is likely that guns were drawn on them. The present case is an example of those "circumstances in which the police presence is so overpowering as to be 'inconsistent with a brief Terry-type stop 'to determine [the defendant's] identification or to maintain a status quo.'" See LaFave, supra, § 9.2(d) (Supp. 1992); Commonwealth v. Sanderson, 398 Mass. 761, 500 N.E.2d 1337 (1986) (deeming assemblage of six officers and a police dog an arrest rather than a Terry stop).

Of course, police may use force or other exceptional methods during a Terry stop when such measures are reasonably necessary for their safety and protection. But even then, the officers must employ the least intrusive means reasonably available to effect the purpose of the stop. See, Florida v. Royer, 103 S.Ct. at 1325.

The Court of Appeals' Opinion in this case conflicts with its earlier pronouncement that:

> A person is under arrest for fourth amendment purposes when, under the circumstances, a reasonable person would have believed he was not free to leave.

State v. Cornwall, 810 P.2d 484, 488 (1981), quoting Florida v. Royer, 460 U.S. at 502, 103 S.Ct. at 1326-27. Federal courts have also held that a level-two stop evolves into a level-three arrest when, in view of all the circumstances, a reasonable, innocent person in the suspect's place would believe himself to be under arrest. See, United States v. Pinion, 800 F.2d 976, 979 (9th Cir. 1986), cert. denied, 480 U.S. 936, 107 S.Ct. 1580 (1987).

As Judge Orme pointed out, a reasonable, innocent person in Mr. Leonard's place would have believed himself to be under arrest:

> The police converged on defendant in three separate cars. The initial confrontation was somewhat hostile despite defendant's passivity, and may well have included a show of weapons by one or more officers. Defendant was ordered to his knees at the side of the highway, while his female companion was placed in the back of a police vehicle. Defendant was then informed of his Miranda rights. It is unlikely that, at this point in the encounter, a reasonable person in defendant's position would believe his seizure to be less than a level-three custodial one.

State v. Leonard, Appendix 1 (J. Orme, dissenting, n. 6) (emphasis added). See also, Kraus v. County of Pierce, 793 F.2d 1105, 1108-09 (9th Cir. 1986) (where officers turned spotlights on the defendant, drew their weapons, and ordered the suspects to drop to their knees, a reasonable person would have believed himself under arrest).

Question 2: Did the State meet its burden of proof?

The State did not provide additional evidence that would

justify the intrusive methods used by the police in this encounter. "The officers did not frisk defendant, or otherwise attempt to discern if he was carrying a weapon. This strongly suggests that, once defendant had been stopped and exited his car, the officers did not suspect he was armed." State v. Leonard, Appendix 1 (J. Orme, dissenting, n.4). "Other circumstances of the stop--the highway locale, the presence of four officers, the non-violent nature of the suspected offense, and defendant's non-furtive attempt to approach the police vehicles--also indicate the situation was not potentially dangerous, and that intrusive tactics were inappropriate." Id.

The State has the burden to show that a seizure it seeks to justify was limited to the conditions of a level-two stop. See, State v. Johnson, 805 P.2d 761 (Utah 1991) (reviewing on writ of certiorari an officer's basis for the level-two stop of a motor vehicle and finding that the extent of intrusion on the passenger was not justified); United States v. Al-Azzawy, 784 F.2d 890, 894 (9th Cir. 1985), cert. denied, 476 U.S. 1144, 106 S.Ct. 2255 (1986); United States v. Williams, 714 F.2d 777, 781 (8th Cir. 1983), quoting Florida v. Royer, 103 S.Ct. at 1325-26.

The State failed to meet its burden in this case. See, State v. Leonard, (J. Orme, dissenting, n.5). Therefore, the denial of Mr. Leonard's suppression motion should have been reversed and the matter remanded to the trial court with instructions to permit

withdrawal of his guilty plea.

Question 3: Was probable cause lacking?

Even when considered in their totality, the facts of record which were known to the officers at the time of the initial stop would not amount to the "probable cause" necessary for an encounter more intrusive than a level-two stop.

In a prior decision, the Court of Appeals has explained that:

> Although the government may present a lengthy list of detailed observations, the courts are not relieved of their duty to review the list critically and decide whether each particular observation cited actually contributes something to the "whole picture"--that is, whether the particular observation bears any reasonable correlation to a suspicion that the person presently is engaged in criminal activity.

State v. Sery, 758 P.2d 935, 944 (Utah App. 1988), quoting United States v. Sokolow, 831 F.2d 1413, 1418 (9th Cir. 1987). A fortiori, a list of factors said to support a finding of probable cause must be reviewed critically.

The trial court's first finding was that Intertech was under surveillance, resulting in a number of arrests and convictions. However, the Court of Appeals had previously declared that "an area's reputation for criminal activity should not be imputed to an individual." State v. Holmes, 774 P.2d 506, 509 (Utah App. 1989).

Officer Fox's observations of Mr. Leonard at Intertech have little bearing. "Scanning or "looking around" is not such unusual

behavior that it would support a finding of reasonable suspicion, much less "probable cause." See, Sery, 758 P.2d at 944. Wearing Levis and a Polo shirt is not suggestive of criminal activity. Nor is driving a personal rather than a company car.

The Court of Appeals had pointed out in an earlier case that "nervousness" is a highly subjective characteristic. "An officer's mere conclusion regarding defendant's nervousness, unsupported by relevant objective facts, can have no weight in determining if he had a reasonable suspicion of criminal activity." Sery, 758 P.2d at 944-45.

The State never showed that the occupants of the Datsun that swerved in front of Officer Fox had any connection to Mr. Leonard.

The list of purchased items which Intertech gave to the officers while they were in pursuit, was not necessarily indicative of illegal activity. The list showed that glassware and chemicals, whose purchase was not illegal or regulated but could be used in the manufacture of a controlled substance, had been purchased.

Finally, the problem of an apparent lack of registration for the Bronco should have been quickly dispelled with the information that it was registered in the name of the passenger, Ms. Garza. The lack of a registration certificate and the fact that the occupants did not own the car did not rise even to the level of an articulable suspicion that a crime had been committed, in State v. Johnson, 805 P.2d 761 (Utah 1991). Such "facts are just as

consistent with the more likely scenario that the driver borrowed the car from its rightful owner." Id. at 764.

"The fact that [a police officer's] 'hunch' proved correct is perhaps a tribute to his policeman's intuition, but it is not sufficient to justify, ex post facto, a seizure that was not objectively reasonable at its inception." State v. Sierra, 754 P.2d 972, 977 (Utah App. 1988).

CONCLUSION

The controversial nature of this case, and the need for guidance to state trial courts and police officers, is reflected in the three divergent opinions entered by the three judges of the Utah Court of Appeals.

The main opinion did not apply the Court of Appeals' own test for the occurrence of an arrest, a test which is also applied by federal courts. The Court did not hold the State to its burden of justifying the extent of the officers' intrusion, nor did it follow its own advice to review the list of the officers' observations critically.

For all these reasons, Mr. Leonard asks this Court to grant a writ of certiorari on the questions presented in his petition.

RESPECTFULLY SUBMITTED THIS 11 day of March, 1992.

JOSE TRUJILLO
Attorney for Petitioner

Certificate of Hand-Delivery

I, Jose Trujillo, hereby certify that an original and nine copies of the foregoing Petition for Writ of Certiorari will be delivered to the Utah Supreme Court, 332 State Capitol, Salt Lake City, Utah 84114, and four copies will be delivered to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 11 day of March, 1992.

JOSE TRUJILLO

DELIVERED by Cristina Vorher this 11 day of March, 1992.

APPENDIX 1

Court of Appeals' Opinion

&

Order Denying Rehearing

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee,	)	OPINION (For Publication)
v.	)	Case No. 900560-CA
Foster Leonard, Defendant and Appellant.	)	F I L E D (December 5, 1991)

Fourth District, Utah County
The Honorable George E. Ballif

Attorneys: Jay Fitt, Orem, for Appellant
R. Paul Van Dam and Marian Decker, Salt Lake City, for Appellee

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Before Judges Jackson, Orme, and Russon.

JACKSON, Judge:

Defendant Foster Leonard appeals from his conviction for possession of equipment with intent to manufacture a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37C-8 (1990), and for conspiracy to manufacture a controlled substance, a third degree felony, in violation of Utah Code Ann. §§ 76-4-201 (1990) and 58-37-8 (1990). We affirm.

BACKGROUND

From approximately May 1, 1989, to when the present facts occurred, law enforcement agencies had been conducting surveillance at Intertech Chemical in Orem, Utah. The surveillance had resulted in several arrests and convictions relating to the possession and manufacture of controlled substances, specifically methamphetamine. On July 20, 1989, Police Officer Terry Fox was conducting surveillance at Intertech. He noticed defendant and April Garza in the parking lot. Both were dressed in clothing "not typical of

business[people]," and looked nervous. Defendant went into Intertech and came out carrying a box of what appeared to be glassware and chemicals. Defendant loaded the box into a Ford Bronco, and drove away from the parking lot with Garza. Fox decided to follow the vehicle in order to identify its owner.

As Fox proceeded out of the parking lot in his unmarked vehicle, a Datsun truck swerved in front of him. Fox testified that he thought the driver of the Datsun was trying to block him from pursuing defendant's vehicle. Fox continued to follow defendant, who drove recklessly onto the freeway. Defendant's vehicle accelerated to over seventy miles per hour and made several illegal lane changes, according to Fox. Fox also observed defendant putting bandanna-type flags out both windows of the Bronco, apparently to signal the occupants of the Datsun. Fox attempted to find out who owned the vehicle he was pursuing, but the police dispatcher found no owner registered for the license plates on defendant's vehicle. The Datsun similarly had no registered owner.

Fox testified that he decided to stop defendant for the traffic violations he had witnessed. Thinking that he might be in danger, Fox called for assistance. Three other police officers eventually assisted Fox in stopping defendant. One of those, Detective Gary Caldwell, learned from Intertech that defendant and his companion had purchased glassware and a chemical. None of the items purchased were controlled substances, but all were commonly used in the manufacture of methamphetamine. Caldwell testified that he made the decision to stop the vehicle based on his belief that defendant was in possession of drug paraphernalia and controlled substances.

When defendant's vehicle was pulled over, the officers had defendant and Garza get out of the vehicle and kneel down on the side of the freeway. Under Caldwell's direction, Officer Sean Greening placed Garza in his vehicle and asked her name, address, and birthdate. Garza produced an Oregon driver's license. Greening testified that he also advised Garza she did not have to answer his questions. Garza asked why she was being stopped, to which Greening replied "for possession of drug paraphernalia." Garza then explained to Greening that someone had paid her and defendant to purchase the items, and that they were to deliver the items to a motel room.

Meanwhile, Caldwell asked defendant for a driver's license and vehicle registration. Defendant had no identification and told Caldwell the vehicle belonged to Garza. Defendant then gave

Caldwell the name "Scott Leonard" and a birthdate which was later determined to be false. Caldwell testified he advised defendant of his constitutional rights and defendant consented to answering some questions. Caldwell then proceeded to question defendant as to what he was doing in Utah County. Defendant told Caldwell that he had come to Utah County to purchase the items for someone, and that he could not tell Caldwell who that was, because defendant would get in trouble. Caldwell also testified that he could see a box in the back of the Bronco, and that the box contained the items Intertech had told him defendant had purchased.

Because the stories given by defendant and Garza were different, and because he knew what items defendant had purchased at Intertech, Caldwell arrested defendant and Garza. Defendant and Garza were transported to the American Fork Police Department and both were questioned by Caldwell. Eventually Caldwell determined the exact address of the apartment which defendant and Garza shared, and a search warrant of the premises was obtained, based on Caldwell's affidavit.

Defendant moved to suppress the evidence found in the warrantless search of the Bronco and in the warrant search of his apartment, claiming that the officers did not have probable cause to initiate the stop of his vehicle. The trial court denied his motion. Defendant then entered a conditional plea of guilty pursuant to this court's decision in State v. Sery, 758 P.2d 935, 938 (Utah App. 1988), and this appeal followed.

Before this court, defendant appeals the denial of his motion to suppress, claiming that the evidence was illegally obtained. Specifically, defendant claims that his arrest was not based on probable cause; that the search of the Bronco was not based on probable cause; and that the search of his residence was tainted by the illegality of the arrest.

STANDARD OF REVIEW

Our review of findings of fact underlying a trial court's decision on a motion to suppress is governed by the "clearly erroneous" standard, State v. Grovier, 808 P.2d 133, 133 (Utah App. 1991), because the trial court is in an advantageous position to determine the factual basis underlying such a motion. "The trial court's finding is clearly erroneous only if it is against the clear weight of the evidence . . . ." State v. Sery, 758 P.2d 935, 942 (Utah App. 1988).

LEGALITY OF THE INITIAL STOP

The Fourth Amendment to the United States Constitution requires that all seizures of an individual be based on probable cause.[1] The United States Supreme Court first explicitly permitted a seizure of an individual upon less than probable cause in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968). The Terry Court held that a police officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. at 21, 88 S. Ct. at 1880. The reasonable suspicion standard is codified at Utah Code Ann. § 77-7-15 (1990):

> A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or attempting to commit a public offense and may demand his name, address and an explanation of his actions.

"Stressing that each case must be decided upon its own facts, the Terry court concluded that the limited stop and frisk was justified where 'a police officer observes unusual conduct which leads him reasonably to conclude in light of his [or her] experience that criminal activity is afoot . . . .'" State v. Sery, 758 P.2d 938, 941 (Utah App. 1988) (quoting Terry, 392 U.S. at 30, 88 S. Ct. at 1884). Thus, a temporary detention or seizure is justified when there is an articulable suspicion that

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1. The Fourth Amendment to the United States Constitution provides, with our emphasis:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

an individual has committed or is about to commit a crime.[2] See id. (quoting Florida v. Royer, 460 U.S. 491, 498, 103 S. Ct. 1319, 1324 (1983) (plurality opinion)). This court has further refined the Terry reasonable suspicion test, concluding that a "brief investigatory stop must be based on 'objective facts' that the 'individual is involved in criminal activity.'" State v. Holmes, 774 P.2d 506, 508 (Utah App. 1989) (citations omitted).

The State argues that several facts support the conclusion that the officers in the present case had a reasonable suspicion that criminal activity was afoot, and that therefore the stop of defendant was justified. Intertech had been under surveillance for selling drug paraphernalia; defendant's behavior was suspiciously inconsistent with that of a legitimate businessman; defendant purchased several items from Intertech which are commonly used in the manufacture of methamphetamine; defendant

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2. Of course, no suspicion is required when a police officer merely makes an inquiry of an individual in the context of a wholly voluntary encounter. The Utah Supreme Court has determined that there are three levels of police-citizen encounters, each of which requires a different degree of justification to be constitutionally permissible:

> (1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will;
> (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop";
> (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987) (per curiam) (quoting United States v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984)). "The stopping of a vehicle and the consequent detention of its occupants constitute a level two 'seizure' within the meaning of the fourth amendment, even if the purpose of the stop is limited and the resulting detention brief." State v. Steward, 806 P.2d 213, 215 (Utah App. 1991) (citing State v. Sierra, 754 P.2d 972, 975 (Utah App. 1988)). In our case, it is not disputed that a level two stop occurred.

left Intertech in an unregistered vehicle; some person in a Datsun tried to prevent the officers from pursuing defendant; defendant displayed bandannas from the windows of his vehicle in an apparent attempt to signal the occupants of the Datsun; and defendant drove erratically and illegally on the freeway, apparently engaging in evasive tactics.[3]

We agree that there was an articulable suspicion which justified the stop of defendant's vehicle, and that therefore the level two seizure of defendant was reasonable.[4] While defendant contends that the officers had no evidence that a crime had been committed, we note that the officers were not only entitled, but probably required, to obtain more information when they reasonably suspected a crime had been committed. See State v. Folkes, 565 P.2d 1125, 1127 (Utah), cert. denied, 434 U.S. 971, 98 S. Ct. 523 (1977); Holmes, 774 P.2d at 508. We hold, therefore, that defendant was constitutionally stopped and briefly detained, and that the trial court's determination that the requisite reasonable suspicion existed was not clearly erroneous.

ARREST OF DEFENDANT AND SEARCH OF VEHICLE

Having determined that the initial seizure of defendant was lawful, we must determine if the subsequent arrest and search were lawful. Defendant argues that the police officers lacked probable cause to arrest him, or to conduct a warrantless search of the vehicle in which he was riding. The trial court found that the arrest of defendant was based on probable cause because the chemicals and equipment found in the vehicle were commonly

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3. The State also lists as support for the contention that the stop of defendant was based on a reasonable suspicion, several facts which occurred after defendant had been stopped. Of course, only facts known to the officers at the time they stopped defendant's vehicle are relevant. See State v. Baird, 763 P.2d 1214, 1217 (Utah App. 1988). See also State v. Mendoza, 748 P.2d 181, 183 (Utah 1987).

4. While Fox testified that he originally planned to stop defendant for traffic violations, it is clear from the record that Caldwell, who took charge of the situation once he was contacted by Fox, stopped defendant's vehicle for the purpose of ascertaining who defendant was, and for what purpose the glassware and chemicals had been purchased from Intertech.

used together in the manufacture of methamphetamine, and because testimony revealed that only one specialized piece of glassware and some chemicals were lacking to make the illegal substance. As to the search of defendant's vehicle,[5] the trial court found that there was probable cause based on the list of items purchased from Intertech received while the officers were in pursuit, the suspicious behavior of defendant, and "all attendant circumstances."[6] However, the court's ruling does not indicate which exception to the warrant requirement of the Fourth Amendment it was relying upon in justifying the warrantless search.

The Arrest

As to the legality of the arrest, Utah Code Ann. § 77-7-2 (1990) provides authority for peace officers to make an arrest with or without a warrant. Reasonable cause for arrest without a warrant was defined by the Utah Supreme Court in State v. Hatcher, 27 Utah 2d 318, 495 P.2d 1259 (1972): "The determination should be made on an objective standard: whether

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5. We refer to the vehicle which defendant was driving as "defendant's vehicle," but we note that the vehicle actually belonged to passenger Garza.

6. The State does not argue that defendant, because he was not the owner of the vehicle, has no standing to challenge the search of the vehicle. Therefore, we do not reach the question of whether defendant had a legitimate expectation of privacy in the vehicle.

Prior to State v. Schlosser, 774 P.2d 1132 (Utah 1989), our supreme court never required the issue of standing to be raised by the parties in the trial court or on appeal. "Standing is an issue that a court can raise sua sponte at any time." State v. Tuttle, 780 P.2d 1203, 1207 (Utah 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 1323 (1990). Rather, that court reached the issue regardless of whether or not a party had raised it. See State v. Constantino, 732 P.2d 125, 126-27 (Utah 1987) (per curiam); State v. Valdez, 689 P.2d 1334, 1335 (Utah 1984); State v. Purcell, 586 P.2d 441, 443 (Utah 1978). In Schlosser, however, the court held that standing to challenge the validity of a search is not a jurisdictional doctrine, and, as such, that issue is waived if not raised before the trial court by the parties. Schlosser, 774 P.2d at 1138-39. But see Schlosser, 791 P.2d at 1139-41 (Howe, J., dissenting) (two justices would sua sponte raise issue of standing).

from the facts known to the officer, and the inferences which fairly might be drawn therefrom, a reasonable and prudent person in his position would be justified in believing that the suspect had committed the offense." Id. at 1260 (citations omitted). See also State v. Ayala, 762 P.2d 1107, 1111 (Utah App.), cert. denied, 773 P.2d 45 (Utah 1989).

The arresting officer, Caldwell, testified that he questioned defendant regarding his presence in Utah County and the purchase from Intertech. Only after defendant gave a false name and birthdate, could provide no plausible explanation for the purchase, and would not tell Caldwell who had paid him to make the purchase, did Caldwell effectuate an arrest.

These facts, taken together with the evasive tactics engaged in by defendant when the officers were pursuing him, the fact that the officers knew exactly what defendant had purchased from Intertech based on the list of items received while in pursuit, and the fact that the items found in defendant's vehicle were commonly used together in the manufacture of methamphetamine, warranted arresting defendant. Accordingly, we cannot say that the trial court's finding of probable cause was an erroneous one.

The dissent takes issue with the tactics employed by the officers in effectuating a level two stop, concluding that a de facto arrest actually occurred. Admittedly, if defendant had been arrested immediately upon being stopped by the officers, probable cause would have to be established at that point, and not after Caldwell interviewed defendant. While many courts have addressed the issue of when a seizure occurs,[7] the cases are less clear on when an arrest occurs. The United States Supreme Court has acknowledged that it is sometimes difficult to distinguish an investigative stop from a de facto arrest. See United States v. Sharpe, 470 U.S. 675, 685, 105 S. Ct. 1568, 1575 (1985). There

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7. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 1877 (1968). See also Immigration and Naturalization Serv. v. Delgado, 466 U.S. 210, 216-17, 104 S. Ct. 1758, 1763 (1984) (intimidating circumstances surrounding police questioning result in Fourth Amendment seizure); United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980) (person is seized when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave").

is no "litmus-paper test for . . . determining when a seizure exceeds the bounds of an investigative stop[,]" Florida v. Royer, 460 U.S. 491, 506, 103 S. Ct. 1319, 1329 (1983), and becomes an arrest. Rather, the determination usually depends upon the reasonableness of the stop under the circumstances. Two factors, whether there was a proper basis for the stop, and whether the degree of intrusion was reasonably related to the facts and circumstances at hand, are determinative of reasonableness. Terry, 392 U.S. at 19-20, 88 S. Ct. at 1878-79; United States v. Hardnett, 804 F.2d 353, 356 (6th Cir. 1986), cert. denied, 479 U.S. 1097, 107 S. Ct. 1318 (1987). While the dissent does not dispute there was a reasonable basis for the stop, it does take issue with tactics employed by the officers. In reaching our conclusion that a proper level two stop was effectuated in this case, a review of cases which have addressed this question is useful to illustrate that no arrest took place.

The dissent is correct in acknowledging one exception to the general proscription against intrusive police conduct: police are permitted to use a show of force or other exceptional methods during a Terry stop when such measures are reasonably necessary for the protection and safety of the investigating officers. The mere use or display of force in making a stop will not necessarily convert a stop into an arrest. United States v. Greene, 783 F.2d 1364, 1367 (9th Cir.), cert. denied, 476 U.S. 1185, 106 S. Ct. 2923 (1986); United States v. White, 648 F.2d 29, 34 (D.C. Cir.), cert. denied, 454 U.S. 924, 102 S. Ct. 424 (1981). See also Adams v. Williams, 407 U.S. 143, 146, 92 S. Ct. 1921, 1923 (1972) (police officers making a reasonable investigatory stop should not be denied the opportunity to protect themselves from possible attack); United States v. Lego, 855 F.2d 542, 545 (8th Cir. 1988) (officer can point a gun at suspect without transforming investigative stop into arrest); United States v. Trullo, 809 F.2d 108, 113 (1st Cir.) (because "officer suspected appellant of dealing in narcotics, a pattern of criminal conduct rife with deadly weapons," display of weapon justified), cert. denied, 482 U.S. 916, 107 S. Ct. 3191 (1987); United States v. Eisenburg, 807 F.2d 1446, 1451 (8th Cir. 1986) (experienced police officers acted reasonably in drawing weapons in investigative stop of suspected narcotics dealer).

We recognize that the officers' conduct, ordering defendant to kneel at the side of the road, was intrusive.[8] If weapons were drawn, the conduct is even more intrusive.[9] Certainly such conduct would not be warranted if the surrounding circumstances did not give rise to a justifiable fear for personal safety. United States v. Hardnett, 804 F.2d 353, 357 (6th Cir. 1986). However in this case, there was justification. While the dissent acknowledges that certain situations merit officers approaching a suspect with their weapons drawn, or ordering a suspect to lie on the ground, the dissent argues that in this case, such actions were not warranted because the police never determined whether defendant had a weapon, and there was no indication that defendant was dangerous. However, that conclusion is based on faulty assumptions.

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8. Focusing on whether or not requiring a driver to step out of his or her vehicle exceeds the scope of a Terry stop, the Supreme Court has concluded that "[w]hat is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety." Pennsylvania v. Mimms, 434 U.S. 106, 98 S. Ct. 330 (1977). See also United States v. Lego, 855 F.2d 542, 545 (8th Cir. 1988) (officer's confining suspect in police car within scope of investigative stop); United States v. Manbeck, 744 F.2d 360, 377-78 (4th Cir. 1984) (upholding reasonableness of investigative stop where police ordered the suspect to take a seat in the police car), cert. denied, 469 U.S. 1217, 105 S. Ct. 1197 (1985). Also, as the dissent points out, police may require a suspect to lie on the ground. See, e.g., United States v. Buffington, 815 F.2d 1292, 1300 (9th Cir. 1987).

9. There is nothing in the record that supports the dissent's conclusion that defendant was not violent or armed. In fact, quite the opposite can be assumed given the facts recited above. On similar facts, the Ninth Circuit Court of Appeals held that it was reasonable to assume that a suspected narcotics dealer was armed and dangerous. United States v. Salas, 879 F.2d 530, 535 (9th Cir.) (erratic and evasive driving by defendants and reports of drug materials in defendants' motel room gave police reasonable suspicion that defendants were armed), cert. denied, 493 U.S. 979, 110 S. Ct. 507 (1989); see also United States v. Post, 607 F.2d 847, 851 (9th Cir. 1979) ("[i]t is not unreasonable to assume that a dealer in narcotics might be armed").

First, the record does not indicate whether or not defendant was frisked. Two of the officers who testified gave different accounts of what transpired after defendant's vehicle was stopped.

Second, the record does indicate that the officers thought defendant was dangerous and could be carrying a weapon. Officer Fox testified that he became fearful when bandannas were put outside the windows of defendant's car. He decided to call for back-up officers to stop defendant's car when the bandannas appeared, and when he saw the cream-colored Datsun following him. "I felt it was a chase car, an assistance car," Fox testified, "and I was again fearful that I needed to have enough help to stop this vehicle so I wouldn't get hurt." In addition, Fox stated that when he sees an unregistered vehicle, he immediately gives it more caution. Officer Greening, who also testified at the suppression hearing, stated that he was called to assist in a stop for drug paraphernalia, and that he has been informed in past circumstances that "these people could be dangerous, and thats why [he] was there to assist." Greening went on to say that officers, including himself, were often called to assist on DUI's and regular traffic stops, and "whenever an officer may feel he is in danger," and that it was his belief in dealing with people who were involved with drugs that "[t]hey have been convicted criminals and in the possession of firearms." We find abundant support in the record that the officers believed defendant could be armed or dangerous, and not, as the dissent suggests, that the police had nothing more than a hunch that defendant might be dangerous. Therefore, the officers' actions were not unreasonable to insure their safety.

The dissent points to defendant being read his Miranda rights as further indication that an arrest took place. In Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138 (1984), the Supreme Court held that Miranda warnings were not required when a defendant is subjected to questioning during a routine traffic stop. The Court pointed to the circumstances around a traffic stop and compared them to stationhouse interrogation, "which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek." Id. at 448, 104 S. Ct. at 3149 (citations omitted). Given that traffic stops occur in public, and that they are relatively brief, the Court concluded that "persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of Miranda." Id. at 440, 104 S. Ct. at 3150. The Court, however, also noted that police "could ensure compliance with the law by giving the full Miranda

warnings." Id. at 431 n.13, 104 S. Ct at 3145-46 n.13.[10] That is exactly what took place here.

In the present case, defendant was detained briefly on the side of the highway. The officers interrogated defendant. Defendant was arrested after he gave the officers false information, and had no plausible explanation for the Intertech purchase. Given the circumstances facing the officers, we conclude that they pursued their investigation in a diligent and reasonable manner, and that the methods employed were not excessive.

The Search

Admittedly, the search of defendant's vehicle conducted without a warrant is unreasonable per se unless it falls within a recognized exception to the warrant requirement. See State v. Bartley, 784 P.2d 1231, 1235 (Utah App. 1989). The State, acknowledging that the trial court did not rely upon a specific exception, claims that the search was justified pursuant to the automobile exception.

While an individual has a lesser expectation of privacy in a vehicle as opposed to in his or her home, the protection of the Fourth Amendment still applies. See State v. Schlosser, 774 P.2d 1132, 1135 (Utah 1989) (citing California v. Carney, 471 U.S. 390-93, 105 S. Ct. 2066, 2068-70 (1985)). In Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280 (1925), the Supreme Court determined that a warrantless search of an automobile was

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10. In United States v. Bautista, 684 F.2d 1286 (9th Cir. 1982), the Ninth Circuit Court of Appeals held that while officers are not required to give Miranda warnings every time they question a suspect, "Miranda warnings are necessary even during a Terry stop if the suspect has been taken into custody or if the questioning takes place in a police dominated or compelling atmosphere." Id. at 1291 (citing United States v. Wilson, 666 F.2d 1241, 1247 (9th Cir. 1982); United States v. Harris, 611 F.2d 170, 172 (6th Cir. 1979)); United States v. Hickman, 523 F.2d 323, 327 (9th Cir. 1975), cert. denied, 423 U.S. 1050, 96 S. Ct. 778 (1976). Compare United States v. Baron, 860 F.2d 911, 914 (9th Cir. 1988) (police exceeded scope of investigative stop by ordering defendant not to touch anything or say anything, and thirty-five minutes later confined her to a small room for questioning), cert. denied, 490 U.S. 1040, 109 S. Ct. 1944 (1989).

permissible if the officers have probable cause to believe the automobile contains either contraband or evidence of a crime and that they may be lost if not immediately seized. Id. at 151-52; see also United States v. Ross, 456 U.S. 798, 806-07, 102 S. Ct. 2157 (1982); Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 1978-80 (1970); United States v. Mendoza, 722 F.2d 96, 100 (5th Cir. 1983); State v. Dorsey, 731 P.2d 1085, 1087-88 (Utah 1986); State v. Christensen, 676 P.2d 408, 411 (Utah 1984); State v. Droneburg, 781 P.2d 1303, 1305 (Utah App. 1989) (citing Carroll, 267 U.S. at 132); State v. Holmes, 774 P.2d 506, 512 n.6 (Utah App. 1989). Thus, where as here, a vehicle is lawfully stopped based on a reasonable suspicion of criminal activity, a warrantless search is justified where the officers have probable cause to believe contraband is contained in the vehicle.

"The determination of whether probable cause exists . . . depends upon an examination of all the information available to the searching officer in light of the circumstances as they existed at the time the search was made." State v. Dorsey, 731 P.2d at 1088 (citing Brinegar v. United States, 338 U.S. 160, 176, 69 S. Ct. 1302, 1311 (1949)). Probable cause for a warrantless search has been found to exist on facts similar to those in the present case. In Mendoza, drug enforcement agents conducted surveillance of a residence, and also followed individuals who had contact with the suspect who resided there. The agents observed several of these individuals driving "in a manner calculated to elude surveillance," Mendoza, 722 F.2d at 101, using pay telephones, and making several trips to and from a warehouse. While the court said that these facts may be consistent with innocent behavior, the totality of the circumstances justified a warrantless search of the suspects' vehicles. Id. at 101-02.

Similarly, in Dorsey, our supreme court upheld a warrantless search of an automobile where a police officer who was assisting other officers involved in an undercover narcotics purchase, followed defendant's truck and eventually stopped him. The court found that because the officer knew that a controlled narcotics purchase had been attempted; that two of the individuals had left the motel room where the negotiations were taking place; that someone involved in the transaction had on a dark leather jacket; and that defendant was wearing a dark leather jacket, probable cause existed. Dorsey, 731 P.2d at 1089.

Reviewing all of the information available to the officers in the present case, we hold that there was probable cause to justify the search. Officers Caldwell and Fox both testified

that they observed drug paraphernalia and chemicals in plain view in the vehicle.[11] The officers also testified that defendant could not explain why he purchased the items, or for whom they were purchased. While the officers' information at the time of the search might not be sufficient by itself to establish guilt, it was sufficient to establish probable cause. See id. Therefore, the trial court's determination that probable cause existed for the search was not erroneous.

VALIDITY OF THE SEARCH WARRANT

Defendant's last claim is that the affidavit in support of the warrant to search his apartment contained nothing from which a detached and neutral magistrate could conclude that the apartment contained evidence of a crime. It is well established that a finding of "probable cause supported by oath or affirmation" is required for the issuance of a search warrant. State v. Brown, 798 P.2d 284, 285 (Utah App. 1990) (citation

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11. This testimony raises an interesting question in that none of the officers testified that they actually conducted a search of defendant's vehicle, only that they had seen the box containing the Intertech purchase on the back seat. Although not briefed or raised by the State, a second exception to the warrant requirement of the Fourth Amendment is the plain view exception. Determining whether the plain view exception applies requires application of a three-pronged test: (1) the officer's presence must be lawful; (2) the evidence must be in plain view; and (3) the evidence must clearly be incriminating. State v. Holmes, 774 P.2d 506, 510 (Utah App. 1989) (citations omitted).

It is clear that in the present case, the officers' presence was lawful. We have already established there was reasonable suspicion to stop defendant's vehicle. It is also clear from the record that the box containing the glassware and chemicals was clearly visible in the back seat of the vehicle. As for the third prong, "clearly incriminating" has been defined as "probable cause to associate the property with criminal activity." State v. Kelly, 718 P.2d 385, 390 (Utah 1986) (quoting Texas v. Brown, 460 U.S. 730, 741-42, 103 S. Ct. 1535, 1543 (1983) (plurality opinion)). In this case, there is evidence to suggest that the contents of the box were associated with criminal activity because all of the items purchased are used in the manufacture of illegal substances, and are rarely purchased in combination for any other purpose. Thus, all of the requirements for the plain view exception are satisfied.

omitted). In reviewing a probable cause determination, a magistrate's decision will be upheld if "the magistrate had a substantial basis for . . . [determining] that probable cause existed." State v. Babbell, 770 P.2d 987, 991 (Utah 1989) (quoting Illinois v. Gates, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332 (1983)).

Contrary to defendant's assertion, the affidavit in this case is sufficient. Taken as a whole, the affidavit establishes that the affiant relied on his own and upon Fox's investigation and observations of defendant's conduct; that defendant had purchased several items which were known to be used in the manufacture of methamphetamine; that defendant gave false information as to where he resided, and when questioned about the Intertech purchase; and that Garza, with whom defendant shared the apartment, and who was arrested at the same time based upon the same facts as defendant, had previously been convicted for conspiracy to manufacture and distribute illegal substances. See State v. Stromberg, 783 P.2d 54, 57 (Utah App. 1989) (probable cause determination supported by fact that defendant has previously been convicted of similar offense), cert. denied, 795 P.2d 1138 (Utah 1990). These facts, taken together, support the trial court's determination that probable cause existed for the issuance of the search warrant.

CONCLUSION

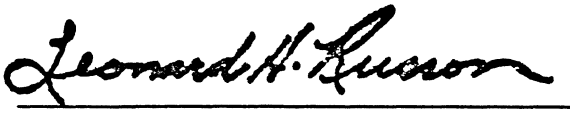
We hold that the stop and subsequent warrantless search of defendant's vehicle, defendant's arrest, and the warrant search of defendant's home did not violate his rights, and therefore, the trial court's decision to deny defendant's motion to suppress the evidence found as a result of those searches was not clearly erroneous. The conviction is affirmed.

Norman H. Jackson, Judge

RUSSON, Judge (concurring in the result):

I concur in the result of the main opinion, but write separately because I prefer a different analytical approach to reach the same result. I would hold that probable cause to arrest Leonard existed at the time at which the officers stopped

Leonard's vehicle. The facts which support probable cause include: (1) evidence that the continuing surveillance had resulted in several arrests and convictions relating to the possession and manufacture of methamphetamine; (2) Officer Fox's observation that Leonard's dress and manner were suspiciously inconsistent with those of a legimate businessman; (3) the Datsun truck's attempt to block Officer Fox from following Leonard; (4) Leonard's evasive driving manner, including driving at excessive speeds and making numerous illegal lane changes; (5) Leonard's apparent attempt to signal the occupants of the Datsun truck by waving bandanna-type flags out the window; (6) Officer Fox's discovery that no owner was registered for the license plates on the vehicle that Leonard was driving; and (7) the fact that Officer Caldwell had learned from Intertech what items had been purchased by Leonard and his companion, in concert with Officer Caldwell's knowledge that the said items are commonly used in the manufacture of methampetamine. On the basis of these facts, I would hold that the officers had probable cause to arrest Leonard when they stopped his vehicle, and that therefore the trial court properly denied Leonard's motion to suppress. Accordingly, I agree that Leonard's conviction should be affirmed.



Leonard H. Russon, Judge

ORME, Judge (dissenting):

In its brief, the State does not contend that there was probable cause to arrest defendant or subject him to anything more intrusive than a level-two Terry stop at the time the police officers effected the stop and asked their initial questions. Accordingly, the debate on appeal was principally directed to whether the police officers possessed the articulable suspicion necessary to justify a level-two encounter. I agree the officers had the requisite articulable suspicion to warrant a level-two stop. It does not follow, however, that what the officers actually effected was a proper level-two stop. Given the intrusive tactics employed by the investigating officers, I believe the main opinion errs in determining that the initial seizure was a level-two stop and not a de facto arrest requiring probable cause.

According to the record, the police officers stopped defendant because they suspected him of committing a non-violent felony--possession of equipment used in the manufacture of controlled substances. There were four police officers present, and three police cars, while only defendant and his female companion occupied the stopped vehicle. The stop occurred along the shoulder of a well-traveled highway, apparently during daylight.[1] At no time prior to the stop had the officers seen defendant or his companion in possession of a weapon, and the record provides no indication that the police had anything more than a pre-stop hunch that defendant might be dangerous. When defendant's vehicle came to a halt on the shoulder of the highway, defendant voluntarily exited the vehicle and walked toward the police cars. There is no evidence that defendant made furtive gestures, carried himself suspiciously, or otherwise approached the police in anything but a cooperative, non-violent manner.[2]

Nonetheless, Officer Fox testified that before questioning defendant, he ordered defendant to kneel down at the side of the highway. The female occupant of defendant's vehicle was placed in one of the police cars. Further, although neither Officer Fox nor Officer Caldwell recalled specifically whether any of the police officers drew their guns at the time they made the stop, Officer Fox claimed it was "very possible" guns were drawn, and Officer Caldwell stated that he "hoped" at least one of the officers had drawn his gun. Finally, Officer Fox testified that before questioning defendant, Officer Caldwell advised defendant of his Miranda rights.

A Terry stop "involves no more than a brief stop, interrogation, and, under the proper circumstances, a brief check for weapons." United States v. Robertson, 833 F.2d 777, 780 (9th

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1. Although the record does not state the time of the stop, other facts--i.e., that, just prior to the stop, officers had been conducting surveillance at a wholesale establishment open for business, and that officers clearly saw bandannas being waved from defendant's vehicle--indicate that the stop took place during daylight hours.

2. It would thus appear that any pre-stop concern the officers had about the potential dangerousness of defendant would have been largely dispelled by his non-confrontational approach. Any lingering concern could have been dispelled by a simple pat down of the sort permitted by Terry.

Cir. 1987). Anything beyond such a brief and narrowly-defined intrusion constitutes a de facto arrest, and probable cause is required. See id.; Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 2254 (1979). The accepted rule is that what might have otherwise been a level-two stop evolves into a level-three de facto arrest when, in view of all the circumstances, a reasonable, innocent person in the suspect's place would believe himself to be under arrest. See United States v. Pinion, 800 F.2d 976, 979 (9th Cir. 1986), cert. denied, 480 U.S. 936, 107 S. Ct. 1580 (1987). See also Florida v. Royer, 460 U.S. 491, 502, 103 S. Ct. 1319, 1326-27 (1983) (characterizing relevant inquiry as whether the suspect believed he was being detained). Accordingly, in the course of a valid Terry stop the police may not, as a matter of routine, utilize methods which might commonly be employed incident to arrest. 3 W. LaFave, Search and Seizure § 9.2(d) at 366 (2d ed. 1987).

There is, however, one exception to this general proscription against intrusive police conduct. Police are permitted to employ a show of force or other exceptional methods during a Terry stop when such measures are reasonably necessary for the protection and safety of the investigating officers.[3]

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3. For situations in which police officers may draw weapons while effecting a stop, see, e.g., United States v. Jones, 759 F.2d 633, 638-39 (8th Cir.) (drawing weapons is permissible part of vehicle stop "if the police action is reasonable under the circumstances," taking into consideration "the number of officers and police cars involved, the nature of the crime and whether there is reason to believe the suspect might be armed, the strength of the officers' articulable, objective suspicions, the erratic behavior of or suspicious movements by the persons under observation, and the need for immediate action by the officers . . . ."), cert. denied, 474 U.S. 837, 106 S. Ct. 113 (1985); United States v. Nargi, 732 F.2d 1102, 1106 (2d Cir. 1984) (display of weapons does not transform stop into arrest when suspected crime is a serious felony and stop was made in an isolated area); United States v. Jacobs, 715 F.2d 1343, 1345-46 (9th Cir. 1983) (drawing weapon acceptable when vehicle's occupant is suspected of bank robbery and is possibly under the influence of drugs, and the police officer is alone).

For situations in which police officers may require a suspect to lay down on the ground, see, e.g., United States v. Laing, 889 F.2d 281, 285 (D.C. Cir. 1989) (when suspect ran toward apartment for which police had a warrant to search for guns and drugs, and suspect put his hand into his pants, it was acceptable for police to force suspect to lie on the floor), cert. denied, 110 S. Ct. 1790 (1990); United States v. Taylor,

(continued...)

However, even then, the investigating officers must employ the least intrusive means reasonably available to effect the purpose of the stop. See Royer, 103 S. Ct. at 1325 (recognizing that, although permissible level of intrusion will vary with circumstances, least intrusive means must always be employed).

I agree that, in the instant case, the State has set forth sufficient facts to support a finding that the police had reasonable suspicion to stop defendant and make a level-two inquiry. However, given the circumstances of the encounter, I do not believe those same facts support a finding that the intrusive methods used by the police were necessary to protect the officers during the stop.[4] The State has provided no additional evidence to justify the officers' conduct.[5] Therefore, on the record before us, I believe the seizure to have been too intrusive to qualify as a level-two stop.[6]

3(...continued)
716 F.2d 701, 709 (9th Cir. 1983) (stop not invalid because police ordered suspect to lie on the floor, when suspect had disobeyed police commands to raise his hands and had made furtive gestures); People v. Chestnut, 51 N.Y.2d 14, 409 N.E.2d 958, 962, 431 N.Y.S.2d 485 (ordering suspect to the floor was permissible when suspect was in company of man whom there was probable cause to arrest for an armed robbery that had just been committed, and police had witnessed a suspicious exchange between that man and the suspect), cert. denied, 449 U.S. 1018, 101 S. Ct. 582 (1980).

4. The officers did not frisk defendant, or otherwise attempt to discern if he was carrying a weapon. This strongly suggests that, once defendant had been stopped and exited his car, the officers did not suspect he was armed. Robertson, 833 F.2d at 781. Other circumstances of the stop--the highway-side locale, the presence of four officers, the non-violent nature of the suspected offense, and defendant's non-furtive attempt to approach the police vehicles--also indicate the situation was not potentially dangerous, and that intrusive tactics were inappropriate.

5. The problem may essentially be a failure by the State, at the trial court, to develop the available evidence so as to meet its burden of proof. Little attention seems to have been given at the evidentiary hearing to what the police did in effecting the stop as opposed to what they knew in deciding to effect the stop.

6. Nonetheless, I might still be willing to view the facts as not moving the case from the level-two to the level-three pigeonhole if, at the time the seizure occurred, a reasonable,

(continued...)

It is the State's burden to show that the seizure it seeks to justify was sufficiently limited to satisfy the conditions of a level-two stop. United States v. Williams, 714 F.2d 777, 781 (8th Cir. 1983) (quoting Royer, 103 S. Ct. at 1325-26). See United States v. Al-Azzawy, 784 F.2d 890, 894 (9th Cir. 1985), cert. denied, 476 U.S. 1144, 106 S. Ct. 2255 (1986). For the reasons discussed above, I believe the State falls short of satisfying that burden. See also note 4, supra. Accordingly, I would hold that the district court erred in determining defendant

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6(...continued)
innocent person in defendant's place would not have believed himself to be under arrest. See United States v. Pinion, 800 F.2d 976, 979 (9th Cir. 1986), cert. denied, 480 U.S. 936, 107 S. Ct. 1580 (1987). I find such a possibility unlikely here. The police converged on defendant in three separate cars. The initial confrontation was somewhat hostile despite defendant's passivity, and may well have included a show of weapons by one or more officers. Defendant was ordered to his knees at the side of the highway, while his female companion was placed in the back of a police vehicle. Defendant was then informed of his Miranda rights. It is unlikely that, at this point in the encounter, a reasonable person in defendant's position would believe his seizure to be less than a level-three custodial one. Other cases have reached the same result in similar circumstances. See, e.g., United States v. Delgadillo-Velasquez, 856 F.2d 1292, 1295 (9th Cir. 1988) (Terry-stop of suspected drug dealers held invalid when police approached with guns drawn, ordered the suspects to lie down in the street, and handcuffed them, since the "show of force and detention used in this context are indistinguishable from police conduct in an arrest"); Kraus v. County of Pierce, 793 F.2d 1105, 1108-09 (9th Cir. 1986) (under circumstances in which police turned spotlights on the suspects, drew their weapons, and ordered the suspects to drop to their knees, a reasonable person would have believed himself to be under arrest), cert. denied, 480 U.S. 932, 107 S. Ct. 1571 (1987).

was subjected to a valid level-two stop, reverse the denial of defendant's suppression motion,[7] and remand with instructions to permit withdrawal of his guilty plea.

Gregory K. Orme, Judge

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7. The evidence seized from the car and from defendant's home is tainted by the illegality of his "arrest" on less than probable cause. Probable cause came into existence only when defendant made incriminating statements when in custody, but such custody was improper where it was supported by nothing more than an articulable suspicion.

FILED

JAN 9 1992

Gilary Leonard

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah,	)	
	)	
Plaintiff and Appellee,	)	ORDER
	)	
v.	)	Case No. 900560-CA
	)	
Foster Leonard,	)	
	)	
Defendant and Appellant.	)	

Before Judges Orme, Jackson, and Russon.

The court has considered the state's petition for rehearing. The opinion issued ruled in favor of the state. The petition requests that a footnote be deleted. The footnote has no bearing on the result of the opinion. Revision or deletion of the footnote will not materially affect the result of this case. The petition is accordingly denied. See Utah R. App. P. 35. However, the author has elected to revise the footnote. A copy of the opinion as revised is attached.

Dated this 9th day of January 1992.

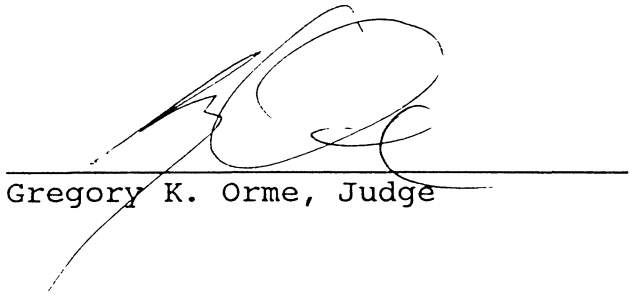
BY THE COURT:

Norman H. Jackson, Judge

Leonard H. Russon, Judge

ORME, J. (concurring):

I concur in the decision to deny rehearing, but on a slightly different rationale. The focus of the petition is a single footnote in Judge Jackson's opinion. However, no other member of the panel joined in that opinion. Three separate opinions were written, none of which has precedential value, and none of those opinions can be taken as "the opinion of the court." It follows that granting a rehearing with the limited objective of revising one of those opinions is not in the interest of judicial economy or development of the law.



Gregory K. Orme, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of January, 1992, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

Jay Fitt
Attorney at Law
835 East 1400 South
Orem, Utah 84058

The Honorable George E. Ballif
District Court Judge
County Building
Provo, UT 84601

and a true and correct copy of the foregoing ORDER was hand-delivered to a personal representative of the Attorney General's Office to be delivered to the each of the parties listed below:

R. Paul Van Dam
State Attorney General
Marian Decker
Assistant Attorney General
236 State Capitol Building
Salt Lake City, UT 84114

Dated this 9th day of January, 1992.

By Sheri Brighton
Deputy Clerk

APPENDIX 2

Trial Court's Order Denying Motion to Suppress

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

****

STATE OF UTAH,	)	Case Number 88-CR-0042 88-CR-0043
Plaintiff,	)	
vs.	)	RULING CR 89-301
FOSTER LEONARD and APRIL GARZA,	)	
Defendants.	)	

****

This matter came before the Court on the August 29, 1989 hearing on defendant's motion to suppress evidence obtained from the arrest of above entitled defendants, and the subsequent search of defendants' vehicle and place of residence. Sherry Ragan appeared for the State. Both defendants were present and represented by counsel. Defendant Leonard was represented by Jay Fitt and defendant Garza was represented by Dean Zabriskie. Witnesses were called and evidence was presented. The Court, having carefully considered all the evidence enters now its:

RULING

From approximately May 1, 1989, law enforcement agencies had been conducting suveillance at Intertech Chemical in Orem Utah. The surveillance has resulted in a number of arrests and convictions. On July 20, 1989, Detective Terry Fox was conducting surveillance at Intertech. He noticed defendant Leonard in the parking lot wearing casual clothes and using what

appeared to be a personal vehicle rather than a company vehicle. Leonard behaved in a nervous manner. He purchased what looked to the detective to be glassware and chemicals and appeared to pay in cash. Defendants loaded the glassware and chemicals in to the vehicle and left the parking lot.

Detective Fox decided to follow the vehicle in order to identify its owner. As Fox attempted to follow the vehicle, another car swerved in front of Fox in an apparent attempt to disrupt his progress. It appeared to Fox that the defendants' vehicle was trying to evade pursuit. Fox noted reckless behavior on the part of the defendants as they turned to get on the freeway that nearly caused an accident. On the freeway, the defendants' accelerated to over 70 miles per hour in a 55 miles per hour zone.

Detective Fox called for back up after a check through dispatch found no owner registered for either the plates of the defendants' vehicle nor for the vehicle that swerved in front of him. The vehicle was stopped without incident after the backup arrived. The officers on the scene then arrested the defendants and gave the appropriate Miranda warnings. Defendants were interviewed separately concerning what they had purchased and the purpose for which they had purchased it. They gave the officers different stories--but both indicated that they were purchasing the equipment for someone else. Defendant Leonard at first gave a false identification and date of birth. Over $2,000 was found in defendant Garza's purse.

Prior to the arrest of the defendants and the search of the vehicle, the officers had made contact with Intertech and were told what the defendants had purchased. The items found in the vehicle--including glassware and chemicals--matched the description of the merchandise given by Intertech. The vehicle contained items frequently used in the manufacture of methamphetamine. Defendant Garza gave two different addresses as her own. After checking with Mountain Bell, the officers found that one of the addresses given had a phone listed in her name. Based upon the information given above, a search warrant was served on defendant Garza's residence. Numerous "listed" chemicals and drug paraphernalia were found.

The Court finds that the stop made by the officers was appropriate and legal. Detective Fox had reasonable suspicion based on the circumstances taken as a whole. The defendants did not appear to be ordinary businessmen; they appeared to be nervous; they drove erratically; they used what appeared to be a personal vehicle; another car seemed to be acting in concert with defendants in an attempt to block the detective's pursuit; dispatch could not identify owner of the the vehicle from the license plate number; the defendants were traveling more than 15 miles per hour in excess of the speed limit; the list of items purchased given to the officers while in pursuit were indicative of illegal activity. All of these factors taken together could easily create a reasonable and articulateble suspicion necessary to make an investigatory stop.

Defendants were properly given their Miranda warnings. Even before the officers began investigatory questioning which does not require it, defendants were given Miranda warnings. Salt Lake City v. Carner, 664 P.2d 1168, 1170 (1983).

The Court believes the search of the defendants' vehicle was proper. The list of items purchased from Intertech received while the officers were in pursuit, combined with the suspicious behavior of the defendants, and all attendant circumstances, created probable cause for search of the vehicle. Even if the search was improper, the illegality would not affect the legality of the search warrant. The reasoning of the Court is that information relative to the evidence found in the vehicle was available to the officers in the form of a purchase order from Intertech.

The chemicals and equipment found in the defendants' vehicle and on the purchase order from Intertech were commonly used together in the making of methamphetamine. In fact testimony indicated that the materials found lacked only one specialized piece of glassware and some other chemicals to allow one to easily make methamphetamine. Also, such equipment is rarely used in conjunction to make anything other than methamphetamine. The officers, being aware of the facts above, had probable cause to make the arrest.

The Court believes that there was sufficient probable cause for the issuance of the search warrant based on the conduct of the defendants and the purchase order from Intertech. This

probable cause was enhanced by the statements of the defendants relative to the intended use of the supplies obtained from Intertech and the false information given relative to living quarters and identity.

For the reasons given above, the Court finds that the stop of the defendants' vehicle, the subsequent questioning of the defendants, and the issuance of the search warrant were proper. Therefore, the Court denies defendants motion to suppress.

DATED in Provo, this 19th day of October, 1989.

BY THE COURT

GEORGE E. BALLIF, JUDGE

cc: Dean Zabriskie
Jay Fitt
Sherry Ragan

APPENDIX 3

Controlling Constitutional & Statutory Provisions

TEXT OF CONTROLLING CONSTITUTIONAL & STATUTORY PROVISIONS

Amendment IV to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 14 of the Constitution of Utah similarly provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Utah Code Ann. § 77-7-2 (1990) provides:

> A peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person:
>
> (1) for any public offense committed or attempted in the presence of any peace officer; "presence" includes all of the physical senses or any device that enhances the acuity, sensitivity, or range of any physical sense, or records the observations of any of the physical senses;
>
> (2) when he has reasonable cause to believe a felony has been committed and has reasonable cause to believe that the person arrested has committed it;
>
> (3) when he has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:
>
> (a) flee or conceal himself to avoid arrest;
>
> (b) destroy or conceal evidence of the commission of the offense; or
>
> (c) injure another person or damage property belonging to another person.

Utah Code Ann. § 77-7-15 (1990) provides:

> A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.